BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Cable Television Consumer	)	MM Docket No. 92-259
Protection and Competition	)	
Act of 1992	)	
	)	
Broadcast Signal Carriage	)	

To: The Commission

COMMENTS OF NATIONWIDE COMMUNICATIONS INC.

Nationwide Communications Inc. ("NCI"), by its attorneys, hereby files it comments in response to the Notice of Proposed Rule Making, released November 19, 1992, in the above-captioned proceeding (the "Notice").

NCI is the licensee of numerous radio and television broadcast stations throughout the United States. NCI also owns and operates the second largest private cable system in the United States. This private cable system serves nearly 80,000 multiple unit dwellings in Houston, Texas, via a hybrid of master antenna television systems, satellite master antenna television systems, and community antenna television systems. Service to most of these dwellings is provided pursuant to a non-exclusive franchise granted by the city of Houston, where traditional franchised cable service is primarily

provided by Warner-Amex and TCI.[1]

The Notice in this proceeding addresses numerous issues involved in creating and administering a must-carry/retransmission consent system. In these comments, NCI makes recommendations that would clarify a cable operator's carriage requirements and would add efficiency and clarity to the process whereby broadcasters elect must-carry or retransmission consent.

I. The Election Process

As the Commission has recognized, the mandatory carriage and retransmission consent provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act") are quite distinct. Notice at paragraph 2. Nevertheless, the two provisions are related in that certain broadcasters are required to make a choice once every three years whether to request mandatory carriage on certain cable systems, or whether their relationship with the operators of those systems will be governed by the retransmission consent provisions. Id. The process by which operators and multichannel video programming distributors ("MVPD's") obtain retransmission consent, and by which broadcasters elect between must-carry and retransmission consent, should be modified in a manner which promotes speed, efficiency and clarity. Indeed, clarity is especially important in light of the volume of notifications that will be required under the must-carry/ retransmission consent system, as well as the unfortunate history of mistrust between operators and broadcasters in the area of

---

[1] NCI previously owned and operated a traditional franchised cable system in central Ohio.

signal carriage.

NCI believes that the most important step in clarifying the retransmission consent/must-carry election process is to give broadcasters easy access to knowledge of precisely which cable and MVPD systems currently retransmit, and/or seek to begin retransmission of, the broadcaster's signal. Accordingly, the Commission should require an initial notice from cable operators and MVPDs to all local television stations[2] 30 days prior to the time by which broadcasters are required to make an election. This notice would contain the following information:

> 1. The name of the operator and the address of the principal business office where broadcaster election notices should be sent;
>
> 2. The address of the principal headend(s) of the system;
>
> 3. Whether or not the operator currently retransmits the broadcaster's signal (including the channel number on which the station is carried), and whether or not the operator seeks to retransmit that signal (including the proposed channel number if retransmission is proposed);
>
> 4. A box to be checked by the broadcaster if it wishes to engage in negotiations regarding retransmission consent; and
>
> 5. For forms sent by operators of "cable systems," a box to be checked indicating whether the broadcaster will instead seek to exercise mandatory carriage rights, and if so, the broadcaster's basis for entitlement to such carriage.

This form would be returned to the operator if the operator was seeking retransmission consent, or if the broadcaster was seeking

---

[2] I.e., those stations located in the Area of Dominant Influence ("ADI") in which the cable system is located.

mandatory carriage.[3]

The utility of requiring an initial notice from operators is twofold. First, it is the most efficient way of distributing the administrative burden of operators and stations identifying each other. Because of the limited number of local broadcast stations in any particular market,[4] it is relatively easy for operators to identify and contact such stations.[5] However, in light of the fact that there are usually many more cable systems than television stations within an ADI, it is very difficult for a broadcaster to identify which systems its signal is or can be carried on.[6] Second, there is a practical logic to requiring an initial notice from operators: it is the operator that controls the programming on

---

[3] To further promote clarity and efficiency in this process, the Commission should require the use of a standardized form, a model of which would be issued by the Commission.

[4] The number of such stations is finite, and determined by the FCC's table of allocations. The number of cable systems is not so limited.

[5] In light of the ease of identifying and contacting local broadcast stations, there should be a substantial penalty on operators and MVPDs who fail to contact stations, especially if the Commission adopts a "default procedure" (Notice at para. 51) which infers the grant of retransmission consent when a station fails to notify a system in its local market.

[6] NCI recognizes that cable systems must file registration statements that contain a list of the stations carried by the system. However, those statements are not served on the licensee of the station, and the registration statements do not contain all of the information that is proposed in the notices described herein. Furthermore, most MVPDs do not have to file such statements, and information on the stations that they carry would not be so available. Lastly, many cable operators do business as, or operate under, more than one name within a geographic area, adding to the difficulty for broadcasters attempting to contact operators. This initial notice requirement will allow broadcasters to have one address to send an election notice which will apply, unless otherwise stated, to all of the local systems controlled by one operator.

its system, and it should therefore have the initial burden of identifying all the potential broadcasters involved.

The requirement that system operators send the above-described uniform notice to broadcasters would not relieve broadcasters of their obligation to elect between retransmission consent and must-carry. However, regardless of how the broadcaster makes its election, it should not have to place a notarized copy of its election statement in its public file, as suggested in the Notice at paragraph 51. The Commission has not suggested how this publication of potentially proprietary information serves the public interest, and in fact, there is no public interest justification.

Lastly, the 1992 Cable Act provides that each television station must make a single must-carry/retransmission consent election for each cable system in its market, but states that if there is "more than one cable system which services the same geographic area, a station's election shall apply to all such cable systems." In paragraph 45 of the Notice, the Commission construes this to mean that while stations must make the same election for directly competing cable systems, they may make different elections for cable systems in the same market which do not overlap. The Commission seeks comments as to what degree of "overlap" between cable system service areas should trigger the "same election" requirement. Id.

NCI first notes that the "same geographic area" must be the actual area served, not the entire franchised city or market if each of two or more overlapping and competing operators do not

serve the entire franchised city or market. For example, assume that the City of X is served by three operators. Operator A is franchised to serve the entire western half of the City. Operator B is franchised to serve the entire eastern half of the City. The service areas of Operators A and B do not overlap. Operator C is franchised to serve the entire city, but only operates discrete small systems in various places throughout the city. If the "same service area" was the entire City of X, a station would be forced to abide by its election for Operator A in its election for Operator B, which could lead to collusion between these two operators to force the station into an agreement more detrimental to the station than that which would have occurred if the station negotiated individual agreements. Clearly, Congress did not intend to provide for such an opportunity for collusion. Similarly, if a station elects must-carry for systems run by Operator A in the western half of the City of X, that election should not determine the agreement with systems run in the eastern part of the City by Operator C, merely because some of C's systems serve the Western part of the City.[7] Accordingly, the "same geographic area" must not be arbitrarily expanded to an entire franchised city or market.

Regarding the issue as to how much overlap is sufficient to trigger the "same election" requirement, the answer must be <u>any</u> amount of overlap in actual service areas, regardless of how small. Any other choice would place small over-build operators at a

---

[7] Indeed, if such a system were allowed, Operator C would have an unsolvable dilemma if a station elected must-carry for Operator A in the western half of the city and retransmission consent for Operator B in the eastern half of the city.

substantial competitive disadvantage with the major cable operators in its service area. To illustrate with the example described above, if a station elects mandatory carriage on the system run by Operator A, that election should apply to its agreement with the systems run by Operator C in the western half of the City, regardless of the small geographic area covered by Operator C's systems. Thus, in order to fulfill Congress' intent of promoting competition with cable operators, any amount of overlap in service areas should force a station to make the same election for the overlapping systems.

II. Carriage Requirements

Under Sections 4 and 5 of the 1992 Cable Act, cable operators must carry a specified number of commercial and non-commercial stations on their cable systems, depending on the number of usable activated channels on the system and the number of local stations. Mandatory carriage requirements apply only to operators of "cable systems," not to MVPDs generally. See Sections 614(a) and 615(a) of the Communications Act. The Commission should clarify this requirement by specifying that where a cable operator runs a number of discrete and unconnected systems in one market, each discrete system will have the separate mandatory carriage requirements based on the number of usable activated channels in that system.[8] Any other requirement would not only contradict the statutory

---

[8] Discrete "systems" will be defined by individual headends. Distinct regulatory treatment of discrete systems operated within one market is supported by the definition of "cable system," which "means a facility, consisting of a set of closed transmission paths..." (emphasis added). See Section 602(6) of the Communications Act. Systems which are not interconnected are "closed" to each other.

definition of "cable system" and the clear language of the 1992 Cable Act,[9] it would contradict Congress' recognition that different sized cable systems have different capacities, and that smaller systems should not carry the same mandatory carriage burdens as larger systems.

Similarly, the Commission should also clarify the carriage requirements where a cable operator owns equipment that brings a certain number of channels into a building, and the owner of the building owns master antenna equipment that brings additional channels into the building. The cable operator commonly runs the "building owned" equipment jointly with its own equipment, and in such cases, the number of channels should be combined when calculating the number of "usable activated channels" which will determine the nature of the mandatory carriage requirement, and the local signals carried on "building owned" equipment should count towards the carriage requirement for the jointly operated system.

III. Other Issues

In paragraph 33 of the Notice, the Commission seeks comments on whether a formal priority structure should be established where conflicts occur regarding channel positioning. NCI supports the creation of such a priority structure, and in such cases, a station should be given its over-the-air channel position, in order to minimize viewer confusion and to protect the investment that stations have made in publicizing their channel position to

---

[9] That is, those provisions of Section 4 and 5 of the 1992 Cable Act which created the new Sections 614(a) and 615(a) of the Communications Act.

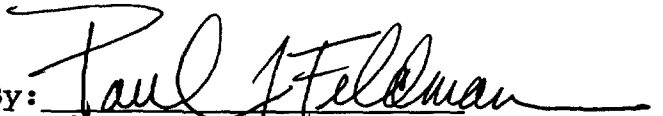
viewers.

In paragraphs 37 and 49 of the Notice, the Commission seeks comments on proposed 30 day notification periods prior to deleting or repositioning a station. NCI asserts that requiring notification 60 days in advance would promote increased dialogue between stations and operators, and provide greater time for resolution of conflicts before a "drop-dead" deadline.

Lastly, in paragraph 61, the Commission seeks comments on whether a minimum amount of a station's programming should be carried if the cable operator is counting a signal carried pursuant to retransmission consent towards its mandatory carriage requirement. NCI believes that fulfillment of Congress' intent in prescribing mandatory carriage requires that the operator carry the station's entire schedule, unless the operator has a good-faith and reasonable belief that a particular program is obscene or indecent.

Respectfully submitted,

NATIONWIDE COMMUNICATIONS INC.

By: 
Edward W. Hummers, Jr.
Paul J. Feldman

Its Attorneys

FLETCHER, HEALD, & HILDRETH
1225 Connecticut Ave. N.W.
Washington, D.C. 20036
(202) 828-5700

January 4, 1993